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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 829

GLADYS N. WALLER, *Petitioner*

v.

NEW AMSTERDAM CASUALTY COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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NEW AMSTERDAM CASUALTY COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Gladys N. Waller, respectfully petitions this Honorable Court for a Writ of Certiorari to review a judgment and opinion of the Court of Appeals for the Fourth Circuit rendered in this cause on September 16, 1963. (see Appendix D, p. 41a), and in connection therewith respectfully shows the following:

CITATIONS TO OPINIONS BELOW

The opinions below involving this cause are reported in 196 F. Supp. 780 (MD NC 1961) (Appendix A); 301 F.2d 839 (4th Cir., 1962) (Appendix B; Opinion

of United States District Court for the Middle District of North Carolina dated September 21, 1962 (Appendix C) (no official citation); and Judgment of the Fourth Circuit dated September 16, 1963 (Appendix D) (no official citation).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1253, which grants this Court power to review the decisions of the Circuit Courts by Writ of Certiorari upon the petition of any party to a civil case before or after rendition of judgment. In connection therewith, it is further shown as follows:

a. The opinion below was rendered and filed on September 16, 1963, without notation as to time of entry.

b. The Honorable Chief Justice of the United States signed an order on the 16th day of December, 1963, granting the petitioner additional time for filing the within petition to and including February 13, 1964.

c. The original jurisdiction of the Federal Court was based on diversity of citizenship concerning a controversy exceeding the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs. Title 28, United States Code, Section 1332.

QUESTION PRESENTED

1. Should a plaintiff recover on a legal theory it has solemnly and judicially disavowed, waived and disclaimed by formal stipulation and by sworn answers to interrogatories?

STATEMENT OF THE CASE

This action was brought by New Amsterdam Casualty Company, plaintiff, in December, 1959, as a result of a judgment it received in 1951 against the insolvent husband of the defendant, Gladys N. Waller, for the purpose of having the defendant declared a trustee as to some real property purchased in her name in 1950 and upon which property a home was constructed in 1953. The complaint appeared on its face to be an action founded on the legal theory of "fraudulent conveyance", which said theory has been reduced to statute in North Carolina.[1] [2]

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[1] § 39-15. *Conveyance with intent to defraud creditors void.*— For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered delayed or defrauded) to be utterly void and of no effect; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding; and in all actions by creditors to set aside gifts, grants, alienations and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fraudulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in value the homestead

After the cause was at issue, the plaintiff, by interrogatories and by oral discovery, sought to inquire into all transactions concerning the purchase of the lot, the construction of the home and the payments made thereon during the period 1950 through 1959. The defendant immediately objected to the inquiry of any matter or thing occurring prior to the three years next preceding the filing of the action due to the fact that a fraudulent conveyance was barred by the Three Year Statute of Limitations in North Carolina, in which state all transactions took place. The plaintiff thereupon advised the trial court orally, by written stipulation and by sworn answers to interrogatories, that it was not depending on the said North Carolina fraudulent conveyance statutes as a basis of recovery, and that it was

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allowed by law as an exemption: Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process, obtained on any debt during the continuance of the homestead, of any interest in such land as may be exempt as a homestead. (50 Edw. III, c. 6; 13 Eliz., c. 5, s. 2; 1715, c. 7, s. 4; R. C., c. 50, s. 1; Code, s. 1545; 1893, c. 78; Rev., s. 960; C. S., s. 1005.)

[1] § 39-17. *Voluntary conveyance evidence of fraud as to existing creditors.*—No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper. (1840, c. 28, ss. 3, 4; R. C., c. 50, s. 3; Code, s. 1547; Rev., s. 962; C. S., s. 1007.)

depending on the equitable theory of "constructive trust" to obtain a judgment against the defendant for the monies she had received from her judgment debtor husband and which were invested in the lot or the home constructed thereon during the previous nine or ten years. Upon the foregoing representations by the plaintiff concerning its theory of the case, the trial court:

1. Concluded, based on the plaintiff's stipulation, that the action was founded on the theory of a "constructive trust" and that the Ten Year Statute of Limitations applied.

2. Struck the defendant's request for trial by jury due to the fact that the plaintiff had stipulated that it was not depending upon the legal theory of the said fraudulent conveyance statutes, but rather was basing its cause on an equitable theory called "constructive trust."

Thereafter, exhaustive discovery was made by the plaintiff, and the defendant's motion to limit the discovery and her motion for summary judgment concerning the Three Year Statute of Limitations were overruled.

All funds received by the defendant from her judgment debtor husband during the period in question were funds from his weekly earnings, and she has managed the family financial affairs since her marriage to the judgment debtor in 1920, and what she saved from the monies turned over to her by the judgment debtor was considered by both to be her own separate property. In 1951 and 1952 the defendant lived with her husband on a construction project in North Africa and saved Twelve Thousand Dollars ($12,-

000.00) from her husband's income, and upon returning to North Carolina in 1953, she spent the $12,000.00 as a down payment on the construction of her home and thereafter made payments on the mortgage from funds saved from her husband's salary and funds given to her by her children, all as detailed in Judge Stanley's original Findings of Fact as set forth in Appendix A, p. 1a.

The trial court awarded the plaintiff a judgment against the defendant for $12,000.00 because of the $12,000.00 down payment made in 1953, but held that the plaintiff failed to establish with any degree of certainty what other amounts, if any, had been paid on the home mortgage by the defendant from her husband's earnings after 1953.

Upon appeal to the Circuit Court, the Circuit Court held that the action rightfully was a cause of action based on the said North Carolina fraudulent conveyance statutes and that the Three Year Statute of Limitations should have been applied. It also disagreed with the trial court as to the certainty of funds which had been furnished from the judgment debtor's weekly salary checks during the three years next preceding the commencement of the action, and remanded the case concerning this particular finding of fact.

Upon remand, the trial court held a conference with the attorneys for the parties, and a stipulation was entered at the Court's request setting forth the gross and net amounts paid on the mortgage during the three years next preceding the institution of the action and it then entered judgment for the plaintiff for the net amount paid (gross less interest and one $2,900.00 payment identified as having been made by the defend-

ant's son). During the conference the attorney for the defendant suggested that the action should be dismissed due to the plaintiff's stipulation concerning its theory of its cause and, in the alternate, the defendant should have a jury trial since the Circuit Court had recognized that the cause of action depended upon the said statutes. The Court overruled both suggestions. The plaintiff suggested that it be allowed to file a supplemental complaint to inquire into the payments made by the defendant during the three years following the original filing of the complaint. The trial court overruled the suggestion. Both sides appealed, and the Circuit Court ruled, in the decisions appealed from herein, that:

a. The stipulation did not bar the plaintiff from recovery and that just because it tried to get the "whole loaf", it should not be denied a more limited portion based on a theory the plaintiff had theretofore solemnly disclaimed in an attempt to evade the Three Year Statute of Limitations.

b. The Circuit Court overruled the trial court and permitted the plaintiff to file a supplemental complaint.

The Circuit Court did not rule on defendant's request that she be allowed trial by jury on the issues which are completely legal and which had been decided by the Court sitting without a jury, notwithstanding defendant's demand.

REASONS FOR GRANTING THE WRIT

This is a diversity action and should be decided under the laws of the State of North Carolina, or at least in accordance with well established principles

concerning stipulations and answers to interrogatories. If the present decision concerning the effect of plaintiff's stipulation is allowed to stand, the following situation will exist in the State of North Carolina.

a. In the Federal Courts solemn stipulations and sworn answers to interrogatories will be no more binding upon the parties than initial pleadings, which are liberally construed under the Federal Rules of Civil Procedure.

b. Discovery and stipulations will mean nothing to the parties or their attorneys, and confusion will reign concerning all issues which arise from the taking of depositions, from the submission of interrogatories and from the detailed and laborious task of entering into stipulations, which are normally considered extremely advantageous to all parties and to the judicial system.

c. A stipulation will have one effect in the Federal Courts of North Carolina and a completely different effect in a State Court, although the subject matter of the litigation is identical. In this particular instance, as shown hereinbelow, had this action been tried in the State Court, the plaintiff would have been barred from recovery under the State law.

d. If the subject decision of the Fourth Circuit is allowed to stand, there will be an apparent conflict between the law of the Fourth Circuit, the Third Circuit, the Sixth Circuit and the Second Circuit, as cited hereinbelow.

e. If the Fourth Circuit's present decision is allowed to stand, any plaintiff can defeat any defendant's right to trial by jury just by alleging or stipulating that it is not depending upon any legal theory even though,

in the last analysis, it must proceed and obtain its judgment on a legal theory or statute, as in the instant case.

The indisputable fact is that, win or lose, the final disposition of this case now turns upon the legal effect of plaintiff's stipulation rather than any finding of fact as to the certainty of any sums given to the defendant by her insolvent judgment debtor husband. This would be true whether the gifts were fraudulent in law or in fact, because the said statutes are the plaintiff's exclusive remedy.

"The burden of proof is on plaintiff to establish that the conveyance or transfer comes within the statute, and the complaint must allege the facts and circumstances constituting the fraud, and a mere averment that the transaction was fraudulent is insufficient"; 2 North Carolina Index, Fraudulent Conveyances, Section 3, P. 399, citing *Davis* v. *Whitehurst*, 229 N.C. 226, 49 S.E.2d 394.

"The creditor's right under the Statute, we repeat, is a right to act, not to disclaim, and consequently he may ratify the transaction as he sees fit. As we have heretofore said, and will take occasion hereafter to repeat, the fraudulent conveyance, first and last, is a real act; and, if the creditor chooses to not push over the transaction, why then; it remains standing: To go free, the grantee needs no release under seal from the creditor, no accord and satisfaction. The creditor may, if he pleases, affirm the transaction or ratify it; and that, once done with full knowledge of the facts, it will be a bar to a subsequent action based on disaffirmance. This rule applies indifferently to a liquidator or other representative of creditors, and to the individual creditor who pursues his own remedy." 1 Glenn, Fraudulent Conveyances, Revised Edition, Section 113, P. 223.

We find in Volume 2A of the General Statutes of North Carolina, Recompiled 1950 by The Michie Company, at Page 286, under the Fraudulent Conveyance Statute, the following editor's note:

> "This section is a substantial re-enactment of the statute 13 Eliz., c. 5, sec. 2. *Bank* v. *Adrian* 116 N.C. 537, 21 S.E. 792 (1895). Prior to its enactment it was necessary to invoke the aid of a court of equity to have a deed declared void for fraud, and where, under a statutory provision, deeds were pronounced void as against creditors in order to secure a formal declaration of their invalidity, the moving party must have asked for relief that would have been formerly administered solely in a court of equity. *Farthing* v. *Carrington*, 116 N.C. 315, 22 S.E. 9 (1895). At an early period in the judicial history of this State, it was held that courts of law might hear evidence and pass even incidentally upon the question whether a deed was fraudulent under 13 Eliz. *Logan* v. *Simmons*, 18 N.C. 13 (1834); *Lee* v. *Flannagan*, 29 N.C. 471 (1847); *Hardy & Bro.* v. *Skinner*, 31 N.C. 191 (1848); *Helms* v. *Green*, 105 N.C. 251, 11 S.E. 470 (1890). The statute of 13 Eliz. is declaratory of the common law so far as regards existing creditors; in this sense the statute is sometimes spoken of as being in affirmance of the common law. The remedy given to subsequent creditors rests entirely upon the enactment of the statute. *Long* v. *Wright*, 48 N.C. 290 (1856)."

What is the effect of plaintiff's stipulation? Turning to the authorities, we first observe the following general discussion of a stipulation in 50 Am. Jur., Stipulations:

> "A stipulation . . . is an agreement, admission, or concession made in a judicial proceeding by the parties thereto or their attorneys, in respect of

some matter incident thereto, for the purpose, ordinarily, of avoiding delay, trouble, and expense. (Section 2, P. 605). . . . It may be stated as a broad, general rule, subject to certain limitations hereinafter noted, that any matter relating merely to the conduct of a pending proceeding, or to the determination of the issues involved therein, which affects only the rights or the convenience of the parties thereto and does not involve any interference with the proper duties and functions of the court, may be the subject of a stipulation. (Section 4, P. 607). . . . As a general rule, stipulations should receive a fair and liberal construction, in harmony with the apparent intention of the parties and the spirit of justice, and in the furtherance of fair trials upon the merits rather than a narrow and technical one calculated to defeat the purposes of their execution. (Section 8, P. 609). . . . *In all cases of doubt, that construction should be adopted which is favorable to the party in whose favor it is made.* (Section 8, P. 609). . . . Subject to the conditions and limitations respecting the subject matter and in compliance with statutory requisites or rules of court, and to rights in respect of withdrawal or relief, *stipulations made by parties to a judicial proceeding, or by their attorneys, within the scope of their authority, are binding upon those whom they lawfully represent, and also upon the trial and appellate courts*, in the absence of any valid ground or reason for refusing enforcement. (Section 9, P. 610). . . . The courts look upon stipulations with favor, and as a rule, will enforce all stipulations of parties or their attorneys for the government of their conduct or the control of their rights in the trial of a cause or the conduct of litigation. If such stipulations are not unreasonable, not against good morals or sound public policy, are within the general scope of the case made by the pleadings, and are in such form as may be required by rule of court or statu-

tory enactment. (Section 12, P. 612)." (Emphasis added)

Turning to the North Carolina authorities, we find it is well established that the parties may not avoid the effect of their stipulations. See generally, 30 S.E. Digest, Stipulations; pp. 904-915. In *Lumbee River Conference* v. *Locklear*, 246 N.C. 349, 98 S.E.2d 453 (1957), there was a dispute as to the use of certain church property. The question there turned on whether the church was an independent sovereign body or subject to the rules and regulations of the Conference. The trial court found for the defendant, but the Supreme Court of North Carolina reversed, holding that the stipulation entered into by the defendant to the effect that the church was a member of the Conference was binding on him and thus he was precluded from later arguing that the church was independent. Thus, the Supreme Court of North Carolina forbade the defendant to take a position contra to that to which he had earlier stipulated. There is little doubt but that the North Carolina Supreme Court would hold the same way in this case were the question presented to it.

Likewise, in *Austin* v. *Hopkins*, 227 N.C. 638, 43 S.E. 2d 849 (1947), the plaintiff sued to establish the exact boundary of property, and the defendant answered on the theory that he owned the property in question by adverse possession. However, the defendant had agreed before the trial that title to the property was not in issue and that the only question was the location of the true boundary line. The Supreme Court in that case affirmed the trial court's refusal to charge on the theory of adverse possession, holding that the defendant's stipulation compelled this result:

"The defendant cannot assert title to the disputed area by adverse possession in face of the stipulation entered into by him." 43 S.E.2d 849.

The case is also precisely parallel to this one, for, here the only question which the plaintiff presented was whether the defendant was liable under the theory of a constructive trust; the plaintiff stipulated that it was not relying on the fraudulent conveyance statutes of North Carolina in any way. It is thus impossible to conceive how any relief whatsoever can be granted on the basis of the North Carolina Statutes or law.

Having disposed of the plaintiff's supposed theories of constructive trust and fraudulent conveyance, it only remains to inquire whether there is any other possible basis for granting relief to the plaintiff in this case. If the plaintiff should endeavor to dream up some new theory of fraud which lies outside the fraudulent conveyance statutes of North Carolina, then it only need be said that in this case there has been an express finding of absence of fraud or bad faith of any sort; and, in any event, should the plaintiff be allowed to proceed on any other theory?

The law on this point is clear and unbroken. There are no exceptions. Having tried the case on one theory, a party to the trial will not be allowed to subsequently change his position. He will not be permitted to "swap horses between courts in order to get a better mount in the Supreme Court." *Weil* v. *Herring*, 207 N.C. 6, 175 S.E. 836 (1934), at 838.

One of the more recent cases supporting this well accepted rule is *Newkirk* v. *Porter*, 237 N.C. 115, 74 S.E.2d 235 (1953). There plaintiff claimed title in a boundary dispute on the basis of adverse possession.

A nonsuit for the defendant was entered and was affirmed on appeal as plaintiff had failed to show continuity of possession for the requisite period. At Page 240 of 74 S.E.2d:

> "Nor does the record justify retaining the cause for trial on the theory of a processioning proceeding under G. S. Section 38-1, et seq. The case was both cast by the pleadings and tried below on the other theory. The theory of the trial prevails on appeal."

Also, see *Enos West* v. *Addie West and Wife, Millie Jones West, et als.*, 257 N.C. 760, 127 S.E.2d 531, 532 (1962), where the Supreme Court of North Carolina quoted as follows:

> "A stipulation is a judicial admission. As such, 'it is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of presenting evidence to establish the admitted fact'."

Where the issue at the trial was whether the instrument was executed by the deceased, and on appeal the validity of the seal was first attacked, the court held that it could not consider the matter. *McGowan* v. *Beach*, 242 N.C. 73, 86 S.E.2d 763 (1955).

In an action to recover for services rendered under an employment contract, the defense in the trial court was based on the theory that no contract existed. The employer could not have the theory that the contract was not binding or enforceable considered on appeal. *Dent* v. *English Mica Co.*, 212 N.C. 241, 193 S.E. 165 (1937).

The defense of an insuror at trial was that the insured was not entitled to benefits. On appeal, the insuror could not successfully contend that the insured accepted checks in full payment where there were no pleadings or issues regarding such acceptance at the trial of the case. *Gossett* v. *Metropolitan Life Insurance Co.*, 208 N.C. 152, 179 S.E. 438 (1935).

Thus, the uncontested rule emerges. "An appeal *ex necessitate* follows the theory of the trial." *McGowan* v. *Beach*, 242 N.C. 73, 86 S.E.2d 763, 766 (1955); *Sawyer* v. *Staples*, 224 N.C. 298, 29 S.E.8d 892 (1944). The citations could be endless, but the general principle that a party is bound by the theory he pursues at trial is supported by: *Lentz* v. *K. B. Johnson & Sons*, 207 N.C. 614, 178 S.E. 226 (1935); *Mercer* v. *Williams*, 210 N.C. 456, 187 S.E. 556 (1936); *Keith* v. *Gregg*, 210 N.C. 802, 188 S.E. 849 (1936); *Gorham* v. *Pacific Mutual Life Insurance Co.*, 214 N.C. 526, 200 S.E. 5 (1938); *Simons* v. *Lebrum*, 219 N.C. 42, 12 S.E. 2d 644 (1941); *Board of Education of Haywood County* v. *Town of Waynesville*, 242 N.C. 558, 89 S.E.2d 239 (1955).

The decisions of the United States Supreme Court are also clear and unwavering on this point. In *Virginian Railway Co.* v. *Mullens*, 271 U.S. 220, 46 Sup. Ct. 26, 70 L. Ed. 915 (1926), plaintiff sued for injuries alleged to have resulted from an obstruction caused by the defendant, which suit was based on tort. The court would not allow him to support his judgment on a theory that the company was liable due to a contractual obligation. The *Virginian* case has been cited and followed in *Mellott* v. *United States*, 257 F.2d 798 (3rd Cir., 1958); *Holm* v. *American Ship-*

building Co., 276 F.2d 201 (6th Cir., 1960); *Ford* v. *C. E. Wilson & Co.*, 129 F.2d 214 (2nd Cir., 1942). For a discussion of the case, see majority and dissenting opinions in *Relyford* v. *Eastern Coal Corp.*, 260 F.2d 447 (6th Cir., 1958), at 457.

Other Supreme Court cases to the same effect are *New York, L. E. & W. R. Co.* v. *Estill*, 147 U.S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292 (1893) (seeking a different basis of damages on appeal bound by actions in trial court); *Thomas* v. *Taylor*, 224 U.S. 73, 32 Sup. Ct. 403, 56 L.Ed. 673 (1912); *Nelson* v. *County of Los Angeles*, 362 U.S. 1, 80 Sup. Ct. 527 at 532, 4 L. Ed. 2d 494 (1960).

Courts are generally bound by and must enforce stipulations regarding matters which may validly be made the subject of stipulations. 83 C.J.S., Stipulations, Section 17; *Moore* v. *Humphrey*, 247 N.C. 423, 101 S.E. 2d 460 (1958).

See also, *Charles M. Britt Co.* v. *Barefoot & Tatum Drugs*, 240 N.C. 755, 83 S.E.2d 883 (1954), at 884: "... the appeal follows the theory of the trial as fixed by stipulations, ..." This rule and the reasons behind it are most exhaustively treated in *J. L. Roper Lumber Co.* v. *Elizabeth City Lumber Co.*, 137 N.C. 431, 49 S.E. 946 (1905).

The Federal cases are no less decisive on this point. See, for example, *Schley* v. *Pullman Car Co.*, 120 U.S. 575, 7 Sup. Ct. 730, 30 L.Ed. 789 (1887) (stipulation binding and limits case on appeal); *New York, L. E. & W. R. Co.* v. *Estill*, 147 U.S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292 (1893) (where the parties agreed that damages to cattle were to be based on the value of cattle

at their ultimate destination, the defendant could not contend on appeal that the true basis of damages was the value of the cattle as they were delivered at the terminus of its road). In *Hankinson* v. *Pa. R. R. Co.*, 280 F.2d 249 (3rd Cir., 1960), the Government was a third party defendant in a suit against a railroad. The Government recognized by stipulation the liability of the railroad to its employee. This later precluded the Government from denying indemnification to the railroad on the grounds that the railroad was a volunteer in settling with the employee, even though there was a finding that the railroad was not negligent. The Government was bound by its stipulation, and the law encourages settlement. Other cases include *Connell Bros. Co.* v. *H. Diederichsen & Co.*, 213 Fed. 737 (9th Cir., 1914), and *Coty, Inc.* v. *Prestonettes, Inc.*, 3 F.2d 984 (2nd Cir., 1924) (issue of unfair competition held removed from case due to stipulation).

Thus, with a rule well settled and accepted for the determination of cases on appeal, we must turn to its application where a case is remanded for further proceedings. In Wigmore on Evidence, 3rd Ed., Vol. 9, Section 2593 (citing as contra, *Cutler* v. *Cutler*, 130 N.C. 1, 40 S.E. 689 (1902)), it is stated:

> "Whether a judicial admission continues to have effect for a subsequent part of the same proceedings, including a new trial, has been the subject of some opposition of rulings, although the orthodox English practice plainly answered in the affirmative."

In the *Cutler* case, an admission of fact at the first trial was given merely for the purpose of avoiding a continuance, because of the absence of a witness, and

could not be used at a subsequent trial, the witness being present and notice being given that the admission would be objected to. That a stipulation will be considered binding is shown by *Jackson* v. *City of Gastonia*, 247 N.C. 88, 100 S.E.2d 241 (1957). There the parties stipulated as to the amount of plaintiff's recovery, if any, so as to dispense with the proof in respect to damages. This stipulation remained conclusive and binding upon the parties on remand of the case for entry of judgment in accordance with the stipulation of the parties, citing 100 A.L.R. 775; 50 Am. Jur., Stipulations, Section 13; and 30 Am. Jur., Evidence, Section 557. 100 A.L.R. is a rather extensive annotation on the availability of a stipulation or a formal admission of facts by counsel for a subsequent trial. In *Davidson* v. *Gifford*, 100 N.C. 18, 6 S.E. 718 (1888), the court says that clear, distinct, formal and solemn admissions *may be used* at a subsequent trial. The *Jackson* case, *supra*, is also authority for this point in North Carolina. As representative of what are the more generally accepted rules are *Sovereign Camp* v. *Jones*, 235 Ala. 378, 178 So. 891 (1938); *LeBarron* v. *City of Harvard*, 129 Neb. 460, 262 N.W. 26, 100 A.L.R. 767 (1935); and *Gonzalez* v. *Pacific Greyhound Lines*, 34 Cal. 2d 749, 214 P.2d 809 (1950).

Thus, a strong and favorable line of authority is present, and according to the Cyclopedia of Federal Procedure, 3rd Ed., Vol. 9, Stipulations, 31.06, "... the use of stipulations is general in all courts, and in a strict sense there is little, if any, practice relating thereto which can be said to be particularly or distinctively applicable to Federal Courts."

As this Honorable Court knows, the trial courts are strictly enforcing discovery rules and are requiring

the parties to enter into stipulations as to undisputed facts and as to other matters and things which will bring into clear focus the exact facts and the contentions of the parties as to fact and law, and it is the opinion of the defendant that this procedure in the trial courts is extremely advantageous to all parties and to the judicial system and that it would be very detrimental to the entire system and to the procedures if the plaintiff not be bound by its solemn admissions and stipulation concerning its theory and cause of action. The plaintiff was well informed of the defendant's position from start to finish concerning the fraudulent conveyance statutes, and the plaintiff solemnly disavowed these statutes in an effort to bring its cause of action under the ten-year statute of limitations rather than to proceed in the action on the logical legal theory available. This resulted in extensive and needless litigation, time and effort, and the defendant has been greatly harmed in defending this action, which plaintiff based on the groundless theory of constructive trust in an attempt to evade the three-year statute of limitations. In this connection, the plaintiff did not cite any case or advance any reason in the Court below which would excuse or mitigate its solemn stipulation or sworn answers to the interrogatories concerning its theory of its case.

> "Courts of equity are not tribunals for the collection of debts; they afford aid to enable creditors to obtain payment only where legal remedies have proved to be inadequate and it is only by the exhibition of such facts as show that these have been exhausted that equity jurisdiction attaches." 24 Am. Jur., Fraudulent Conveyances, Section 211, Pp. 329.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES B. NYE
303 Trust Building
Durham, North Carolina
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

No. C-190-D-59

NEW AMSTERDAM CASUALTY COMPANY, *Plaintiff*,

v.

GLADYS N. WALLER, *Defendant*.

Smith, Leach, Anderson and Dorsett, of Raleigh, North Carolina, and Bryant, Lipton, Strayhorn and Bryant, of Durham, North Carolina, for the Plaintiff.

Charles B. Nye, of Durham, North Carolina, for the Defendant.

Findings of Fact, Conclusions of Law, and Opinion

EDWIN M. STANLEY, Chief Judge.

The plaintiff, New Amsterdam Casualty Company, a New York corporation, seeks by this action to have the defendant, Gladys N. Waller, a resident of Durham County, North Carolina, declared a constructive trustee with respect to certain real property which she owns, to the extent funds belonging to her husband, C. P. Waller, were used to acquire the property. Among other defenses, the defendant pleads the three-year statute of limitation applicable to fraudulent conveyances in bar of plaintiff's right of recovery.

The case was tried by the court without a jury. At the conclusion of the trial, the parties were given a specified time within which to file proposed findings of fact, conclusions of law, and briefs, after which oral arguments would be heard.

The requests for finding of fact, conclusions of law, and briefs of the parties having been received, the court, after

considering the pleadings and evidence, including exhibits, answers to interrogatories and stipulations filed, and briefs and oral arguments of the parties, now makes and files herein its Findings of Fact and Conclusions of Law, separately stated:

Findings of Fact

1. The plaintiff is a corporation organized and existing under the laws of the state of New York, and has its principal place of business outside the State of North Carolina.

2. The defendant is a citizen and resident of Durham County, North Carolina.

3. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

4. In July, 1950, the defendant was conveyed a vacant lot in Durham County, North Carolina, by the Durham Realty and Insurance Company, known as 3201 Surrey Road, Durham, North Carolina, and more fully described in deed record in Book 19-, at Page 223, Durham County Registry. The purchase price of the property was $1,500.00, the entire amount of which was paid by the defendant's daughter, Theda J. Waller, by check dated July 29, 1950, and drawn on the Fidelity Bank of Durham, North Carolina.

5. At the time defendant acquired title to said property in 1950, she knew that plaintiff had instituted a suit in the Superior Court of Wake County, North Carolina, against her husband, C. P. Waller. On June 28, 1951, a judgment was entered in said action in favor of the plaintiff and against the defendant's husband in the amount of $26,868.33, together with interest and costs, which judgment is the basis of this action. The defendant's said husband is hereinafter sometimes referred to as "judgment debtor."

6. In 1953, a house was constructed upon said property located at 3102 Surrey Road, Durham, North Carolina, at

a cost of $34,000.00. The construction cost was paid as follows: $12,000.00 in cash and the balance from the proceeds of a $22,000.00 loan obtained from the Home Building and Loan Association of Durham. The application for the loan was signed by the judgment debtor only, and the name of the defendant did not appear thereon.

7. The $22,000.00 note and deed of trust were jointly signed by the defendant and her husband, but the defendant received in her sole name all the construction money advanced by said association. The defendant also executed in her sole name the settlement statement covering the loan. The judgment debtor was not residing in North Carolina during the actual construction of the home.

8. The judgment debtor has been employed in construction work by the Nello L. Teer Company of Durham, North Carolina, for many years, and his work has carried him out of the state much of the time. Since at least 1943, except for a period in 1951 and 1952 when the defendant and her husband were in North Africa, all of the salary checks of the judgment debtor have been mailed directly by his employer to the defendant at her home in Durham. Most of the salary checks have been endorsed by the defendant and deposited to her personal checking account at the Durham Bank and Trust Company.

9. The defendant and her husband spent most of 1951 and 1952 in North Africa, during which time the defendant's husband was working on a construction job earning a salary of $15,000.00 per year. During this entire time, the judgment debtor's salary checks were sent by his employer directly to a Mr. Farthing in Durham, North Carolina, who invested the money in bonds under the direction and for the benefit of the defendant.

10. The $12,000.00 cash payment made on the home constructed in 1953 was paid by the defendant. The source of these funds is the subject of much controversy between the

plaintiff and the defendant. The defendant kept house, doing the cooking, laundry, ironing, and other household work, for her husband and a daughter during the two years they were in North Africa, and also furnished room and board and laundry for another lady who was living with them. She was paid various amounts each month by her daughter and the other lady living in the home, both of whom were working. The defendant's husband also contributed to the family finances from his expense allowance. The record is not clear as to the exact amount of money Mr. Farthing was holding for the defendant upon her return from North Africa in September of 1952, but the fund was in excess of $12,000.00. The defendant does not remember how she paid the $12,000.00 to the contractor, whether by check or cash, but does remember that she made the payment. She says that the $12,000.00 came from her husband's salary checks invested by Mr. Farthing under her direction, and from money turned over to her to run the home and take care of her family. The defendant has never inherited any money, and has never been paid any salary or wages for work outside the home since she and her husband were married in 1920. Since she had to wait some weeks to join her husband in North Africa due to a lack of funds, it is clear that she had no savings before going to North Africa. She has no idea what funds she saved while in North Africa from money paid by her daughter and the other lady living in her home, and the contributions made by her husband to the family living expenses. However, it is reasonably clear that this was, at most, only a nominal amount. From the entire record, it is found that the plaintiff has established by a preponderance of the evidence that the entire $12,000.00 paid to the contractor by the defendant at the time the house was constructed in 1953 was paid from funds turned over to her by Mr. Farthing, which funds exclusively represented salary checks of the judgment debtor.

11. The judgment debtor was away in 1950 and did not know about the purchase of the land upon which the house was later constructed, or the fact that the title had been put in the defendant's name only, until after the transaction had been completed.

12. The defendant made a will in 1957 devising and bequeathing all of her property, both real and personal, unto her children living on the date of her death, absolutely and in fee simple. Her husband was not mentioned in the will.

13. The monthly payments on the $22,000.00 loan obtained from the Home Building and Loan Association, including principal and interest, are $174.00. The first monthly payment became due on August 1, 1953, and all sums paid on said note and deed of trust have been paid by the defendant, except one payment in the sum of $2,000.00 which was paid by defendant's son from his own earnings.

14. Some of the payments made by the defendant to the Home Building and Loan Association on said note and deed of trust have been from earnings of her husband, and some have been from funds given her by her children. The average net weekly salary of defendant's husband from 1955 through 1959 was $167.20, and his net weekly salary since 1959 has been $155.49, all of which weekly salary checks, as earlier noted, have been sent directly to the defendant and deposited by her to her own checking account. In addition to these weekly salary checks, the defendant has received various sums from her children. Both daughters lived in the home until 1956, and one remained through 1957. They both paid the defendant various sums of money from time to time while living in the home. On one occasion in 1954, defendant's son sent her $500.00, which she used for making payments on the home. The defendant used her husband's salary checks, and the various sums given to her by her children, to operate the home and make the building and loan payments. Considering the

entire record, it is found that the plaintiff has failed to establish with any degree of certainty what amount has been paid the building and loan association by the defendant from her husband's earnings and what amount has come from funds contributed by her children.

15. Defendant and her husband have claimed interest payments made to the Home Building and Loan Association as deductions on their joint Federal income tax returns, and the judgment debtor has claimed the interest payments as deductions on his individual state income tax returns.

16. Prior to the institution of this action, an execution was issued to the Sheriff of Durham County on the aforementioned judgment and same was returned unsatisfied for the reason that no property of the judgment debtor could be found in Durham County from which to satisfy same. No part of the judgment has been paid, and at all times pertinent the judgment debtor has been insolvent.

17. The parties stipulated that the judgment debtor has never been in trust or confidential relationship with the plaintiff since 1948.

18. Neither the defendant nor her husband has ever advised the plaintiff that any part of the judgment debtor's salary was being held in any manner for the purpose of satisfying plaintiff's judgment.

19. The plaintiff has never attempted to attach or garnish any part of the salary checks of the judgment debtor.

20. Neither the defendant nor her husband has ever concealed in any manner from the plaintiff the fact that defendant was receiving the judgment debtor's weekly pay checks.

21. The facts alleged in the complaint are based mainly on facts disclosed to the plaintiff when it adversely examined the judgment debtor on August 27, 1956. There was

particularly disclosed to the plaintiff on said date all the material facts and circumstances relating to the $12,000.00 cash payment made by the defendant on her home in 1953. The plaintiff also knew on said date that defendant was receiving her husband's weekly salary checks and that the judgment debtor had no other income.

22. This action was commenced on December 28, 1959.

23. The plaintiff never advised the defendant prior to the institution of this action that it claimed any right, title or interest in or to any of the judgment debtor's salary checks, or the home which stands in the defendant's name. The plaintiff has never demanded any sum of the defendant except through the institution of this action.

24. At the time her home was constructed in 1953, the defendant knew that the plaintiff's judgment had been rendered against her husband and that same was outstanding and unpaid.

25. It has been stipulated and agreed that the plaintiff is not depending upon the provisions of Sections 39-15 and 39-17, General Statutes of North Carolina, statutes relating to fraudulent conveyances, as a basis for its recovery in this action.

DISCUSSION

The principal question for decision is whether the plaintiff has established the right to subject to the payment of its judgment any part of the funds of the judgment debtor used by the defendant in the construction of her home. The plaintiff contends that the defendant is a constructive trustee for its benefits with respect to such funds. The defendant principally argues that the judgment debtor never gave the defendant any weekly salary checks, or any savings therefrom, which were not exempt from the satisfaction of plaintiff's judgment under the Constitution and laws of the State of North Carolina; that plaintiff has been guilty of laches and unconscionable delay in bringing its

action against the defendant; that the evidence does not indicate with any degree of certainty the amount of funds of the judgment debtor used by the defendant in making the down payment on her home and the monthly payments to the building and loan association; and that at most the plaintiff has only shown a fraudulent conveyance with respect to an undetermined portion of the judgment debtor's funds, and that the action is thus barred by the three-year statute of limitations.

There is no merit to the argument that since the judgment debtor never at any one time received a salary check in excess of his constitutional exemption of $500.00,[1] and never at any one time gave the defendant an amount in excess of such exemption, no part of the funds given to the defendant by the judgment debtor can now be reached by the plaintiff in this proceeding. It is true that the $500.00 personal property exemption guaranteed by the Constitution must be allotted from time to time as often as the judgment debtor might be pressed with execution, the policy being to enable him "not only to have the exemptions allotted to him once, but to keep them about him all the time, for the comfort and support of himself and family." (*Commissioner of Banks* v. *Yelverton;* 204 N.C. 441, 168 S.E. 505 (1933)), but the constitutional exemption has no application to accumulated funds of a judgment debtor, even though accumulated by a series of payments, each less than the $500.00 constitutional exemption. The correct rule is that a judgment debtor may claim his exemption as against successive executions but may not have exempt funds in his possession at any one time in excess of his exemption. Stated another way, a judgment debtor is privileged to make successive claims for his exemption, but may not hold free from execution at any one time an amount in excess of his exemption. 22 Am. Jur., Exemptions, Section 11 and 35 C.J.S., Exemptions, Section 69.

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[1] Article 10, Section 1, Constitution of North Carolina.

Since the defendant had in her possession at one time in 1953 accumulated funds of the judgment debtor in excess of $12,000.00, such funds, even though accumulated in separate payments of less than $500.00 each, would be subject to only one exemption. None of the cases cited by the defendant are to the contrary.

Neither can the plaintiff be held to be guilty of laches and "unconscionable delay" in bringing its action against the defendant. There is no evidence indicating that the plaintiff knew of any basis for bringing its action prior to the time it adversely examined the judgment debtor on August 27, 1956. This action was commenced on December 28, 1959, slightly more than three years thereafter. The defendant has not demonstrated any prejudice by reason of the delay, especially with respect to the $12,000.00 used from the judgment debtor's accumulated salary checks to make the down payment on her home in 1953. The defendant argues that if merit is otherwise found in the plaintiff's action, and the action had been brought earlier, she would not have continued the "thriftiness and sacrifices" which were necessary to enable her to construct and make the monthly payments on the home. The answer to this argument is that the defendant has had the use and enjoyment of her home for almost eight years, and that such was partially made possible through the use of funds that were withheld from her husband's creditors.

The next contention advanced by the defendant presents a more serious problem. The defendant earnestly argues that the evidence fails to disclose with any degree of certainty the amount of funds of the judgment debtor used in making the down payment on her home and the monthly payments to the building and loan association. It is pointed out that all the evidence indicates that the $12,000.00 down payment on defendant's home came from her husband's salary checks invested for her by Mr. Farthing and some money saved while living in North Africa, and that the

monthly payments on the home came from the weekly salary checks of her husband and funds given to her by her children. With respect to the $12,000.00 down payment, the defendant had no idea as to what funds she saved while in North Africa. She could not even state with any degree of certainty that the funds amounted to as much as $200.00. It is certain that Mr. Farthing had for the defendant upon her return an accumulated fund from her husbands' salary checks in excess of $12,000.00, and that the defendant made a $12,000.00 down payment on her home. It is reasonable to assume that any nominal amount the defendant might have saved while in North Africa was used for other purposes, and that the $12,000.00 down payment came from the accumulated salary checks of her husband. Under these circumstances, if the plaintiff is otherwise entitled to prevail, the rule seems to be "that equity will impress the trust character upon the entire mass and treat it as trust property or funds. . . ." *Edgecombe National Bank & Trust Co.* v. *Barrett*, 238 N.C. 579, 78 S.E. 2d 730 (1953). However, the evidence is less clear with respect to the source of the funds used by the defendant to make the monthly payments to the building and loan association. All the evidence indicates that some of the payments came from earnings of the judgment debtor and that some came from funds given the defendant by her children. It was established that on one occasion the defendant's son made a $2,000.00 payment to the building and loan association from his own funds, and on another occasion he gave the defendant $500.00 for use in making building and loan payments. The defendant's daughters gave her various sums of money, certainly through the year 1957. The evidence does not establish with any degree of certainty what portion of the judgment debtor's salary was used to make building and loan payments and what portion was used for the operation and maintenance of the home and for personal expenditures of the defendant and her family. While it is a principle of equity that property

impressed with a trust may be followed through all changes in its state and form, it nevertheless must be capable of substantial identification in order to be impressed with a trust. 54 Am. Jur., Trusts, Section 248, et seq. The prevailing rule is stated in *Edgecombe National Bank & Trust Co.* v. *Barrett*, 238 N.C. 579, 78 S.E. 2d 730 (1953) as follows:

> "But it is a cardinal rule of trust pursuit that the proceeds or the product of the initial property must be traced and identified through any and all intermediate transfers into the property sought to be reached; otherwise the beneficiary has only the rights and remedies of a general creditor to claim damages as for conversion or as for money had and received."

Even though the trust pursuit rule only requires a substantial identification of trust property, the evidence here fails to disclose any basis, percentage or otherwise, for ascertaining what portion of the funds of the judgment debtor was used to make the building and loan payments.

Having determined that the defendant used $12,000.00 in funds belonging to the judgment debtor in making the down payment on her home, and that these funds were used while the judgment debtor was insolvent, and while the defendant had knowledge of such insolvency and the existence of the plaintiff's unsatisfied judgment, it is clear that plaintiff can reach these funds if its action was timely brought. In this connection, the defendant contends that if plaintiff has otherwise established any basis for recovery, its action is barred by Section 1-52, General Statutes of North Carolina, which provides that actions for "relief on the ground of fraud or mistake" shall be barred within three years, and that such action shall be deemed to have accrued when the aggrieved party discovers "the facts constituting the fraud or mistake." It is argued that since plaintiff at most has only shown a fraudulent conveyance

which is condemned by Sections 39-15 and 39-17, General Statutes of North Carolina, and since it has been established that plaintiff had knowledge of all material facts upon which it now bases its claim, and particularly had knowledge with respect to all facts and circumstances relating to the $12,000.00 down payment on defendant's home, more than three years prior to the institution of this action, the plaintiff's claim is clearly barred by the statute of limitations. The plaintiff, on the other hand, contends that its action is to impress the $12,000.00 with a constructive trust in its favor, and that such an action is governed by the ten-year statute of limitations.

It is conceded that actions to establish constructive trusts, as distinguished from actions to set aside fraudulent conveyances, are governed by the ten-year statute of limitations,[2] and not the three-year statute. *Bowen* v. *Barden*, 241 N.C. 11, 48 S.E. 2d 289 (1954).

The distinguishing features between fraudulent conveyances and constructive trusts are not easily discernible. No case has been cited or found which makes the distinctions a basis for decision. Both sides cite *Michael* v. *Moore*, 157 N.C. 462, 73 S.E. 104 (1911), in support of their position. The plaintiff contends that the court, while not stating the theory of the case in so many words, was actually dealing with a constructive trust. The defendant argues that since the case is annotated under Section 39-15, General Statutes of North Carolina, a statute dealing with fraudulent conveyances, the case was decided under that statute. In any event, the facts in the *Michael* case are strikingly similar to the facts here presented, and there can be no doubt but that the legal principles there

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[2] Section 1-56, General Statutes of North Carolina: *All other actions, ten years.* An action for relief not otherwise limited by this subchapter may not be commenced more than ten years after the cause of action has accrued.

laid down are applicable to the facts in this case. After a judgment has been rendered against the judgment debtor, and while an appeal was pending, the judgment debtor and his wife borrowed $2,000.00 on property owned by the judgment debtor, and secured same by a lien on the property. The $2,000.00 so borrowed was used to erect a residence on a lot in the name of the judgment debtor's wife. The wife had notice of the judgment before the execution of the lien to secure the $2,000.00 loan, and before the funds were used in the erection of the dwelling upon her land. She also knew the judgment debtor was insolvent. The jury for its verdict found that the judgment debtor did not obtain the loan and use the proceeds therefrom in the erection of permanent improvements upon the land of his wife "for the purpose of defeating or delaying or defrauding the payment of the plaintiff's judgment against him," and that the wife did not "have knowledge of such purpose on the part of her husband." It was further found that the value of the lot owned by the wife, independent of the improvements placed on it by the money of her husband, was $600.00, and that the judgment debtor expended the sum of $2,000.00 in the erection of a dwelling on the land of his wife. Upon these findings, the trial court held that the wife owned her lot, "subject to the equity in the name of her husband, in the sum of $2,000, to be pursued by the plaintiff as he may be advised." The North Carolina Supreme Court (157 N.C. 462, 73 S.E. 104) held:

> "We entertain no doubt as to the plaintiff's right to follow the fund invested by his debtor in improvements upon his wife's land. No principle is better settled by our decisions than the one that an insolvent debtor cannot withdraw money from his own estate and give it to another to be invested by him in the purchase or improvement of his property, and, when it is done, creditors may subject the property so purchased or improved to the payment of their claims . . .

"It is not necessary to show an actual intent to defraud. The transaction is void per se. . . . The facts of our case are substantially like those in Trefethen v. Lynam, 90 Me. 378, 38 Atl. 335, 38 L.R.A. 190, 60 Am. St. Rep. 271, and with reference to the transaction in that case, by which the wife's property was improved, the court said: 'The wife cannot rightfully retain, as against her husband's creditors, the value of permanent additions voluntarily made by him to her property. Outside of the statute exemptions, he cannot acquire any property which shall be free from the claims of prior creditors; nor can she acquire such property out of his principal or income. Whenever it appears that she has thus absorbed his money or estate, she can be compelled to account for it by this equitable trustee process. The prior creditor of the husband need not show an actual fraudulent intent on the part of either husband or wife. It is enough for him to show that the wife has acquired some property or value out of her husband's unexempted principal or income. This value thus obtained should be restored by her for the payment of his prior debts, though the husband or his representatives might have no legal or equitable claim to such restoration. The wife may owe a duty of restoration to her husband's prior creditors without owing any such duty to him. Under the principles above stated, however, the husband's right is not the test of his prior creditors' right. As to them, neither husband nor wife can erect buildings on her land with his money and retain the benefits. In the absence of fraudulent intent or active participation upon the part of the wife, it might not be equitable to require her to account for the full sum thus subtracted from her husband's means and appropriated to her property, since the benefit to her estate might not be so much; but she could not retain any benefits or incre-

ment in value of his estate made at the expense of her husband's prior creditors. To turn over to those creditors the benefit or increment, if any, thus obtained, would cause her no loss of her own property, but would simply transmit some part of the husband's property to his creditors—a most equitable proceeding.' . . . The court proceeds to subject the property, which has derived a benefit from the improvement, not upon the theory that the wife has contracted, either expressly or impliedly, to pay for the improvements, but it follows the fund taken from the husband's estate, and which justly belonged to the creditors, into her hands and holds the property as security for its repayment, even against her consent. Any other ruling would be entirely opposed to the true principle upon which this equity of the creditors is based, as will appear in the numerous decisions of this court, some of which we have cited. If a husband is permitted thus to dispose of his estate, and without any accountability on the part of the wife to them, it would enable him to commit the most gigantic frauds in defiance of his creditors. The law cannot be supposed to have contemplated any such result in its attempts to protect the wife against the consequences of her improvident contracts. The general doctrine is nowhere better stated than in Perry on Trusts (5th Ed.) § 170: 'Although courts of equity have not made general definitions stating what is fraud and what is not, they have not hesitated to lay down broad and comprehensive principles of remedial justice, and to apply these principles in favor of innocent parties suffering from the fraud of others. These principles, though firm and inflexible, are yet so plastic that they can be applied to every case of fraud as it occurs, however new it may be in its circumstances. The leading principle of this remedial justice is by way of equitable construction to convert the fraud-

ulent holder of property into a trustee, and to preserve the property itself as a fund for the purpose of recompense. In investigating allegations of fraud, courts of equity disregard mere technicalities and artificial rules, and look only at the general characteristics of the case, and go at once to its essential morality and merit. Thus at law married women or infants are liable upon their contracts. But in equity, if a married woman has obtained property by fraud, the court disregards the technical rules of common law in regard to married women, and converts her by construction into a trustee, and compels her to do justice by executing the trust.' . . ."

While the *Michael* case was remanded for the purpose of of reforming the pleadings in certain respects, the quoted legal principles were enunciated notwithstanding the findings that there had been no intent on the part of the judgment debtor to defeat, delay or defraud his judgment creditor, and that his wife had no knowledge of any such fraud. The effect of the decision was to hold that in a situation such as here presented, the wife should be compelled to account for her husband's funds expended in improving her property "by this equitable trustee process," and that there need not be any showing of an actual fraudulent intent on the part of either husband or wife. It is enough to show that "the wife has acquired some property of value out of her husband's unexempted principal or income." Under such circumstances, the court, by way of equitable construction, will convert the holder of the property into a trustee for the benefit of her husband's creditors. The court clearly seems to have been speaking of a constructive trust rather than a fraudulent conveyance.

In *Ewbank* v. *Luman*, 170 N.C. 505, 87 S.E. 348 (1915), an action to set aside a deed on the grounds of fraud, it

was held that plaintiff's action was barred by the statute of limitations, whether the ten-year statute or the three-year statute. Under the facts presented in that case, it was held that the three-year statute was applicable. In *Osborne* v. *Wilkes*, 108 N.C. 654, 13 S.E. 285 (1891), an action under the fraudulent conveyance statute, it was held that the plaintiff's action was barred three years after the discovery of the fraud, or three years after, by the exercise of reasonable diligence, the fraud might have been discovered. Some of the essential elements necessary to constitute fraudulent conveyances under the statute are discussed in this case and in the case of *Aman* v. *Waller*, 165 N.C. 224, 81 S.E. 162 (1914). In the latter case, the court points out that if a conveyance is voluntary, and the grantor does not retain property fully sufficient and available to pay his debts, the conveyance, under the fraudulent conveyance statutes, is invalid as to creditors. The subject of fraudulent conveyance is exhaustively treated in 24 Am. Jur., Fraudulent Conveyances, Section 1, et seq. There it is stated that a fraudulent conveyance is a "transaction by means of which the owner of real or personal property has sought to place the lands or goods beyond the reach of his creditors, or which operates to the prejudices of their legal or equitable rights, or a conveyance which operates to the prejudice of the legal or equitable rights of other persons, including subsequent purchasers." 24 Am. Jur., Fraudulent Conveyances, Section 2. It is further stated that the principle underlying the law of fraudulent conveyances is "that the creditor has a claim upon the property of his debtor, constituting a fund from which the debt should be paid, and that the debtor may not ignore the right or equity of his creditors to be paid out of it." 24 Am. Jur., Fraudulent Conveyances, Section 3. While the existence of a fraudulent intent to delay, hinder or defraud creditors is an essential element in actions to set aside fraudulent conveyances, direct evidence of fraud is not essential if the conveyance is made under such circum-

stances "that the result must necessarily be to hinder or delay creditors. . . .". 24 Am. Jur., Fraudulent Conveyances, Sections 8 through 13. It is sometimes held, for example, that a voluntary conveyance of property without making provisions for creditors, is void or fraudulent per se, regardless of any fraudulent intent on the part of either the transferor or transferee. 2 Am. Jur., Fraudulent Conveyances, Section 25. However, in the absence of actual fraudulent intent, it is generally held that expenditures made by a husband for improvement of his wife's separate estate, are not deemed fraudulent as to the husband's creditors. 2 Am. Jur., Fraudulent Conveyances, Section 66. In the case under consideration, there is no evidence that the judgment debtor actually intended to hinder, delay or defraud the plaintiff by turning his salary checks over to the defendant. All the evidence is to the contrary. This same practice had been followed since at least 1943, long before the plaintiff's claim arose. None of the usual indicia or badges of fraud are present. There was no secrecy or concealment with respect to the disposition being made of the salary checks, and there was no departure from the judgment debtor's usual method of disposing of the checks after the plaintiff's claim arose.

It is significant that the plaintiff does not allege fraud on the part of either the judgment debtor or the defendant, and stipulated that it was not depending on the statute relating to fraudulent conveyances as a basis for its recovery. The relief sought is to have the defendant declared a constructive trustee for plaintiff's benefit with respect to her husband's funds invested in her property. The plaintiff had a right to select any remedy available to it, and any relief may be granted which is consistent with the allegations in the complaint and embraced in the issues joined, although other and different relief might have been sought. In *Sexton* v. *Farrington*, 185 N. C. 339, 117 S.E. 172 (1923), it was held that the action, in view of the theory upon which it was brought, namely, "to have a

party declared a trustee," was barred by the lapse, "not of 3, but of 10 years." In *Atkinson* v. *Atkinson*, 225 N. C. 120, 33 S.E. 2d 666 (1945), the court stated that the plaintiff was entitled to go to the jury upon any cause of action sufficiently stated in the complaint and supported by the evidence. The court then went on to state:

> ". . . The appellant does contend that Dr. Atkinson and the defendant acquired title to the property in dispute, and that the defendant now retains it, under circumstances that should constrain the court to declare the defendant trustee of a constructive trust for his benefit, arising ex maleficio. Such a trust is a remedial device, not referred to the intent of the parties, but imposed upon the wrongdoer in invitum, often contrary to the intent to prevent the consummation of the fraud or unconscionable practice. . . .
>
> "While the theory of recovery is definitely based on fraud, actual or constructive, fraud, in terms, is not alleged in the complaint. Counsel say that the facts upon which fraud is predicated are set out in the complaint, and no more is required. . . .
>
> • • • • • • • • • •
>
> ". . . As a matter of administration, courts are not, of course, concerned with formal classifications of trusts made by text-writers for convenience in treating the subject, so long as emphasis is permitted to remain on the factual situation out of which the trust arises or upon which it may be declared.
>
> "The plaintiff in a matter of this sort must find his cause of action in the invasion of a property right. Equity takes hold at that point, and proceeds as far as it may within the power and practice of the court to restore the parties to the status quo ante injuriam.
>
> "Not attempting in one impossible definition to put a fence around all instances where the court may, with

propriety, declare a constructive trust, we think it safe to say that where it is predicated on fraud in the acquisition of property, or upon fraud, actual or constructive, which, if found, the law will refer to such acquisition, the basis of jurisdiction is the continuance of the equitable interest of the aggrieved person in and to the property of which he has been fraudulently deprived,—an interest which survives the fraud and persists despite the outward form of legality under which it is held and under which the true ownership has been submerged.

"'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.' Judge Cardoza, in *Beatty* v. *Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378, 380."

The court is of the opinion that the plaintiff has alleged and shown facts sufficient to have the defendant declared a constructive trustee for its benefit with respect to the $12,000.00 used to make the down payment on her home, and that the action is not barred by the lapse of time.

The defendant finally argues that the plaintiff is not entitled to have her constituted a constructive trustee for the reason that the judgment debtor has never been in trust or confidential relationship with the plaintiff. This argument is also lacking in merit. While it is true that an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another is generally sufficient to warrant the declaration and enforcement of a constructive trust, the scope and application of the rule is not limited to a breach of some trust or confidential relationship. 54 Am. Jur., Trusts, Section 225. The form and variety of constructive trusts

are practically without limit, and the breach of some confidential or fiduciary relationship is only one situation justifying the imposition of a constructive trust. 54 Am. Jur., Trusts, Section 220.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the subject matter.

2. The defendant is a constructive trustee for the benefit of the plaintiff with respect to the $12,000.00 used in making the down payment on her home in 1953, subject to the $500.00 personal property exemption of the judgment debtor.

3. The plaintiff is not entitled to have the defendant declared a constructive trustee for its benefit with respect to any funds of the judgment debtor used by the defendant in making payments on her home.

Counsel for the plaintiff will prepare an appropriate decree.

(s) EDWIN M. STANLEY
United States District Judge

August 17, 1961

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8480

NEW AMSTERDAM CASUALTY COMPANY,
Appellee and Cross-Appellant,

v.

GLADYS N. WALLER, *Appellant and Cross-Appellee.*

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT DURHAM. EDWIN M. STANLEY, DISTRICT JUDGE.

(Argued January 11, 1962. Decided April 6, 1962.)

Before SOPER, HAYNSWORTH and BRYAN, *Circuit Judges.*

Willis Smith, Jr., and C. K. Brown, Jr., (Smith, Leach, Anderson & Dorsett on brief) for Appellee and Cross-Appellant, and Charles B. Nye for Appellant and Cross-Appellee.

HAYNSWORTH, Circuit Judge:

In this action by a creditor to reach real estate improved by expenditures of the debtor's money but held in the name of the debtor's wife, the District Court held, in the absence of an affirmative intention to defraud the creditor, the

action was not controlled by the North Carolina 3-year statute of limitations applicable to actions founded upon fraud.[1] Since expenditure of the debtor's funds to improve the wife's property was fraudulent in law, whether the parties consciously realized the fraudulent nature of their acts, we think the 3-year statute should have been applied.

C. P. Waller, of Durham, North Carolina, had been engaged in the construction business for many years. In the more recent years, he had been employed by Nello L. Teer Company, of Durham, North Carolina. Earlier, however, he had been an officer and stockholder of the Parkersburg Construction Company, in connection with which, as one of the principals, he personally signed a performance bond. The New Amsterdam Casualty Company, the plaintiff here, was the surety upon that bond. Because of this bond, New Amsterdam was required to complete the construction work which Parkersburg Construction Company had agreed to do for the State of West Virginia. Subsequently, New Amsterdam brought an action against Waller for the amount of its loss and obtained a judgment against him in the Wake County, North Carolina, Superior Court for the principal sum of $26,368.33. This judgment was entered on June 28, 1951.[2]

In July 1950, while New Amsterdam's action against Waller was pending in the state court, Gladys N. Waller, his wife, acquired title to a vacant lot in a residential section of Durham, North Carolina. There is testimony, and the District Court found, that she paid for the lot with

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[1] New Amsterdam Casualty Company v. Waller, D.C.M.D.N.C., 196 F. Supp. 780.

[2] An earlier dismissal of the action had been reversed by the Supreme Court of North Carolina, New Amsterdam Casualty Co. v. Waller, 233 N.C. 536, 64 S.E.2d 826. The judgment against Waller was entered on June 28, 1951, pursuant to the terms of remand, the statute of limitations having been the only defense offered by Waller.

funds given her by a daughter. In 1953, a house was constructed upon this lot at a cost of approximately $34,000. A fund of $12,000, accumulated out of the debtor's salary checks, was expended to pay for the construction work. The balance of the construction cost was obtained through a mortgage loan granted upon the application of the debtor. The note representing the mortgage debt and the deed of trust, which secured it, were signed jointly by the debtor and by his wife, the defendant here. The wife alone signed the settlement statement.

Subsequently monthly payments to the building and loan association, with exceptions to be noted later, were made by checks drawn by the wife upon a bank account into which the debtor's salary checks were regularly deposited.

The details of the Wallers' finances and the handling of their funds were carefully considered by the District Judge and discussed at length in his findings of fact and in his opinion.[3] We need refer to them only summarily here.

Apparently, because the debtor's construction work required him to be frequently away from home, his wife for many years had charge of family finances. At his request, his employer mailed each salary check earned by him to the wife in Durham. These checks she deposited in a bank account in her own name against which she drew checks to meet the living expenses of the family. During most of 1951 and 1952, however, the debtor was engaged in construction work in North Africa, and Mrs. Waller was with him there. During this period, the husband's salary checks were mailed by his employer to an attorney, W. P. Farthing, in Durham, who had represented the husband in the action brought against him by New Amsterdam in the state court. Proceeds of these checks were accumulated, at least in part, by Mr. Farthing, and the accumulations in his hands exceeded $12,000 when the Wallers returned from North Africa. This was the source of the $12,000, which, with

[3] 196 F. Supp. 780.

the proceeds of the mortgage loan, the Wallers used to pay for the construction of the house.

At that time, Mrs. Waller knew of the judgment in favor of New Amsterdam against her husband. Indeed, she knew of the claim and the pendency of New Amsterdam's action when she acquired title to the lot in 1950. It is agreed that the husband was insolvent at all critical times, and husband and wife, of course, knew that they were financing improvements on the wife's lot with funds of the husband.[1]

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[1] They said that the husband caused each of his salary checks to be delivered to her, or to Mr. Farthing for her account, with the intention of making an absolute gift to her of so much of the proceeds as she could save after their ordinary living expenses, his as well as hers. The accumulated fund, they said, was hers not his. The District Court made no finding to that effect. It was not required to do so in view of the likelihood that convenience, arising from his frequent and extended absences from their home, required that she have initial management of the family purse. They had no other income than his salary which, in some years, was as much as $15,000. They had no other property than their residence erected upon her lot. He must have been dependent upon her savings, after ordinary living expenses for extraordinary obligations, even ordinary ones such as his income taxes, those due the state even though his employer's withholding may have sufficed to cover his federal obligations. His actual control of accumulations of his earnings is strongly indicated by such things as the fact that he, alone, applied to borrow the $22,000 to enable them to pay in full the cost of construction of the $34,000 house, and his deduction on his income tax returns of the interest increment of their payments to the building and loan association. They may have acted, of course, without conscious realization of the fraudulent nature of their conduct and without deliberate intention of hindrance of his creditor. The District Court found there was no such realization, no such intention. We accept that finding, for it was permissible.

Whatever their appreciation of the nature and purpose of their acts, the fact is that the insolvent debtor's funds were employed to improve his wife's real estate. The District Court treated the funds as his, not hers, a finding which, if not compelled, was, certainly acceptably permissible.

This action against the wife to reach her property, or so much of its value as represented an investment of the husband's funds, was not commenced until December 28, 1959. More than three years earlier, on August 27, 1956, there had been an adverse examination of the judgment debtor by attorneys for New Amsterdam, during which information was obtained which the District Court assumed[3] would constitute notice to New Amsterdam of the use of the husband's funds to improve the wife's real estate.

Actions founded upon fraud or mistake must be commenced in North Carolina within three years of the accrual of the cause of action. The cause of action does not accrue until the aggrieved party has notice of the facts constituting the fraud or mistake.[4]

The creditor seeks to avoid the 3-year statute of limitations by a disavowal of any claim of actual fraud. It claims no dependence upon North Carolina's statutes relating to fraudulent conveyances.[5] It contents that North Carolina recognizes a cause of action to reach the property in the hands of the wife, without reference to the statutes on fraudulent conveyances and though the transaction was not fraudulent in fact. It says it seeks to impress the property with a constructive trust in its favor, and that the limitations period for the institution of such an action is ten years.

The launching pad of these contentions is the decision of the Supreme Court of North Carolina in Michael v. Moore.[6] There it appeared that an insolvent debtor borrowed $2,000

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[3] Whether or not this assumption is correct would be open for consideration by the District Judge upon remand.

[4] General Statutes of North Carolina, § 1-52(9).

[5] General Statutes of North Carolina, §§ 39-15, 17.

[6] 157 N.C. 462, 73 S.E. 104.

secured by a mortgage on land he owned. With the proceeds of the loan, he built a house on his wife's land. In an action brought by the creditor to reach the improvements on the wife's land, a jury found that the debtor had not acted for the purpose of defeating or delaying his creditor. The North Carolina Supreme Court upheld the right of the creditor to follow the funds belonging to the debtor into the wife's property. Because of the finding of the jury, the Court held it was unnecessary to show that the debtor acted with any actual intention to defraud the creditor; the transaction was void per se by virtue of what is now § 39-17 of the General Statutes of North Carolina. That section provides that the transfer itself is evidence of an intention to defraud the creditor. The North Carolina Court also declared that; whether the debtor's intention was fraudulent or not, the transfer was fraudulent in law and was void as to the creditor.

There was no question of limitations in Michael v. Moore. The holding is only that the transfer was void and fraudulent on its face and the creditor was not required to show that the debtor was consciously motivated by an evil purpose. In so holding, the Court referred to the wife as a constructive trustee for the benefit of the creditor, and said that she could be held to account for the value of the improvement constructed with her husband's funds by reason of that equitable process. However, the Court did not suggest, certainly it did not hold, that there was an independent cause of action to impress a trust upon the wife's property unrelated to the cause of action created by the statutes proscribing fraudulent conveyances. Indeed, as we have noted, the Court cited one of the statutes relating to fraudulent conveyances as authority for its statement that the transaction was void per se.

A constructive trust is merely a procedural device by which a court of equity may rectify certain wrongs. It is suggestive of a power which a court of equity may exer-

cise in an appropriate case, but it is not a designation of the cause of action which justifies an exercise of the power. Professor Scott put it pithily when he said of a constructive trustee:[2]

> "• • • He is not compelled to convey the property because he is a constructive trustee; it is because he can be compelled to convey it that he is a constructive trustee."

We find nothing in any North Carolina decision suggesting that the courts of that state, for purposes of limitations, classify a cause of action by reference to the courts' remedial power to grant redress. There are many decisions of the courts of that state recognizing the courts' power to avoid unjust enrichment by compelling one to convey or disgorge that which in good conscience belongs to another, and in which one burdened with the duty is called a constructive trustee. For purposes of limitations, however, the North Carolina Court has looked to the nature of the right of the litigant which calls for judicial aid, not to the nature of the remedy to rectify the wrong.

In Little v. Bank of Wadesboro, 187 N.C. 1, 121 S.E. 185, the action was one to set aside a deed because of undue influence. The question was whether the action was barred by the 3-year statute applicable to actions founded upon fraud. It was contended by the plaintiff that he was attempting to impress the property with a trust and the 10-year statute was applicable. As here, he buttressed his contention by reference to decisions that undue influence sufficient to invalidate a deed need not imply moral turpitude or improper motivation. The Supreme Court of North Carolina, after referring to such cases, held that the exercise of such undue influence is fraudulent whether intended to be so or not. This was entirely consistent with Michael v. Moore, where the same court held a fraudulent

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[2] 3 Scott on Trusts 2315, § 462.

conveyance to be just that whether or not the grantor appreciated the nature of his act.

The Supreme Court of North Carolina, in Little v. Bank, thereupon held that the 3-year statute applicable to actions founded upon fraud or mistake barred the action, provided the undue influence ended more than three years before the commencement of the action. The 10-year statute, generally applicable to actions to enforce resulting trusts, was held inapplicable. The Court said that the right to impress the trust was dependent upon the right to assail the deed, and the right to assail the deed was founded upon undue influence, a legal fraud.[10]

This Court considered the same question in Reynolds v. Whitin Machine Works, 4 Cir., 167 F.2d 78, 87. There was a claim for relief there because of an alleged breach of confidence involving a trade secret. The defendant contended the action was barred by North Carolina's 3-year statute applicable to actions founded upon fraud, while the plaintiff contended that he was seeking to impress a trust upon the property and that maintenance of the action was governed by the 10-year statute. This Court held that breach of confidence was a species of fraud, and that the action was barred by North Carolina's 3-year statute of limitations. In doing so, the decision of the Supreme Court of North Carolina in Little v. Bank was accepted as declarative of the law of that state.

We also accept it here. It applies generally accepted principle. It does not appear that North Carolina's courts have since departed from it. If Michael v. Moore is read to say an insolvent husband's improvement of his wife's property is fraudulent in law, though he intended no wrong, the present case is not made distinguishable from Little v. Bank, for there, too, the Court recognized that undue influence, fraudulent in law and sufficient to make the deed

[10] See, also, Muse v. Hathaway, 193 N.C. 227, 136 S.E. 633.

void, could have been exercised without an affirmative intention of wrong-doing or an evil purpose. In either instance, the conduct is a legal fraud, and an action brought to undo it must be commenced within three years, else it is barred by North Carolina's statute of limitations applicable to actions founded upon fraud.

Constructive trusts most frequently arise because of actual fraud or mistake. Professor Scott reminds us, however,[11] that fraud or mistake is not invariably an essential ingredient. There may be a constructive trust, though there has been no mistake and though the constructive trustee's conduct was not reprehensible. Words of condemnation may become appropriate only when the constructive trustee seeks to avoid his duty to surrender the property by which he is unjustly enriched to the detriment of another.

Fraud or mistake, however, is so commonly the basis of constructive trusts, it is not surprising that a legislature, many years ago when it undertook to classify actions for purposes of limitations, should have referred to this kind of action as one founded upon fraud or mistake. The Supreme Court of North Carolina has held the section applicable to an action to set aside a deed because of undue influence, though recognizing that undue influence may be exercised without an evil intention.[12] We hold it applicable here. If the Wallers acted without intending to defraud the husband's creditor, as the District Court found,[13] the trans-

[11] 3 Scott on Trusts 2312, et seq., § 462.

[12] Little v. Bank of Wadesboro, 187 N.C. 1, 121 S.E. 185.

[13] We would have some difficulty reaching that conclusion on the facts. The Wallers may have been no more than indifferent to the creditor's rights, but they knew the husband was insolvent and they knew he was employing his money to improve his wife's property. Whatever their conscious motivation, they are chargeable with the inevitable consequence of their acts.

for was a legal fraud and void as to the creditor because of the statute proscribing fraudulent conveyances. This is the kind of action which logically falls under this classification.

Upon a reading of the limitations statutes of North Carolina, it is readily apparent that the classification is based upon the substantive nature of the cause of action. The language immediately applicable here is that an action must be brought within three years if "[f]or relief on the ground of fraud or mistake * * *." There is no suggestion of classification on the basis of remedies which might be available for enforcement of the substantive right. The right asserted is determinative, not the relief sought. A declaration that Mrs. Waller is a constructive trustee is an appropriate remedial step, but it is not descriptive of the substantive right, and the fact that the plaintiff seeks it is irrelevant to the question of limitations.[14]

In a number of North Carolina cases there may be found expressions such as, "A resulting or constructive trust, as distinguished from an express trust, is governed by the ten year statute of limitations."[15] Such references in a single breath to constructive trusts and resulting trusts are found in opinions dealing with resulting trusts. It is clear that in North Carolina, the institution of an action

[14] There are a number of cases in North Carolina holding applicable the 3-year statute rather than the ten, where the plaintiff sought a declaration that the defendant, whose conduct was plainly fraudulent, was a constructive trustee. See, e.g., Tuttle v. Tuttle, 146 N.C. 484, 59 S.E. 1008; Osborne v. Wilkes, 108 N.C. 651, 13 S.E. 285; Ewbank v. Lyman, 170 N.C. 505, 87 S.E. 348; Hooker v. Worthington, 134 N.C. 283, 46 S.E. 726; Rhodes v. Purvis, 197 N.C. 458, 149 S.E. 552.

[15] Bowen v. Darden, 241 N.C. 11, 84 S.E.2d 289. See, also, Teachey v. Gurley, 214 N.C. 311, 199 S.E. 83; Jarrett v. Green, 230 N.C. 104, 52 S.E.2d 223.

to enforce a resulting trust is governed by the 10-year statute.[16] It is a logical classification. If Mr. Waller had a beneficial interest in the house, that property interest should remain subject to execution as long as there is life in the plaintiff's judgment.

Constructive and resulting trusts, however, are not of the same species. Casual and indiscriminate references to one, when speaking of the other, are not persuasive. Certainly they cannot overturn clear holdings that the period of limitations for actions in which the relief asked is the declaration of a constructive trust is determined by reference to the nature of the substantive right asserted.

Though we hold that the District Court should have applied the 3-year statute of limitations rather than the 10-year statute, we think the plaintiff is entitled to some relief.

The District Court held that the plaintiff had failed to prove with sufficient certainty or clarity the extent to which the husband's funds were employed to meet the payments on the mortgage debt. In the light of the proven facts, we think he applied a standard too stringent.

The testimony showed that after their return from North Africa, each of the husband's salary checks was deposited to the wife's account in the bank. Usually the payments on the mortgage were paid by the wife by a check drawn upon that account. The testimony showed that she had no other funds or means of support and the record is barren of any evidence that any funds were ever deposited to that account except the earnings of the husband.

The record of the building and loan association shows several instances of overpayments on the mortgage debt.

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[16] Sexton v. Farrington, 185 N.C. 539, 117 S.E. 172; and see the cases cited in fn. 15.

In one instance, $2,000; and, in another instance, $500 were paid anticipatorily. Mrs. Waller testified that each of these sums was a gift to her from one of their children. Additionally, there was very unspecific testimony that their children from time to time made other small gifts, or contributions, to their parents. Two daughters resided with Mr. and Mrs. Waller during all or part of the period, and the Wallers claimed the children made some contributions to household expenses and for furnishings for their rooms, but there is nothing to connect such incidental contributions or payments with curtailment of the mortgage debt. The very general claim that their children gave her money to be used in making payments on the mortgage debt is made specific only by reference to the two anticipatory payments aggregating $2500.

On this evidence, it was within the province of the District Judge to find, if he was persuaded by the testimony of Mr. and Mrs. Waller, that the two anticipatory payments on the mortgage were made with funds received as gifts from children, but the record appears to show plainly that all other payments on the mortgage were derived from the husband's earnings. The record even contains copies of the husband's individual state income tax returns, which show he claimed as a deduction all of the interest increment of the mortgage payments.

When the creditor was able to show that the wife had no other regular means of support than the husband's earnings, the burden of showing some other source of funds shifted to her. As to the two specific items, the testimony may have been sufficient to discharge that burden, but that, together with vague and unspecific references to gifts and contributions by children at other times, was insufficient to so becloud the picture that the creditor should go with no relief.

Since many of the mortgage payments would not be affected by application of the 3-year statute of limitations,

we think the case should be remanded to the District Court for further proceedings, including the taking of additional evidence if he should determine that to be desirable.

Finally, however, the defendant has advanced an unrelated defense. She claims for her husband North Carolina's constitutional exemption from sale under execution of personal property not exceeding $500 in value.[17] She reasons that since a debtor is said to have the right to deal with exempt property as he chooses, he could give it away without defrauding the creditor. Since each check she received was for an amount less than $500, for the husband's salary was paid weekly, she would apply the exemption successively to each payment. She would have us hold that an insolvent husband may donate to the wife all of his income receipts so long as no one of them exceeds $500, no matter how frequently received or how rich she waxed or the extent of his enjoyment of her riches.

There is no warrant for such a contention. The husband can claim the exemption at the time of levy. If there are successive levies, he can claim it at the time of each levy, but he cannot claim it each time he makes a gift to his wife. As yet, there has been no levy upon any personal property of the Wallers. Until there is, no occasion for application of the constitutional exemption arises.

Reversed and remanded.

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[17] Art. X, § 1 of the North Carolina Constitution.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

No. C-190-D-59

NEW AMSTERDAM CASUALTY COMPANY, *Plaintiff*,

v.

GLADYS N. WALLER, *Defendant*.

Smith, Leach, Anderson and Dorsett,
of Raleigh, North Carolina, and
Bryant, Lipton, Strayhorn and Bryant,
of Durham, North Carolina,
for the Plaintiff.
Charles B. Nye, of Durham, North Carolina,
for the Defendant.

Opinion

STANLEY, *Chief Judge*

When this matter was initially before the Court, it was held that plaintiff's action was controlled by the North Carolina 10-year statute of limitations, and that the defendant was a constructive trustee for the benefit of the plaintiff with respect to certain funds she derived from her husband's earnings and used in making the down payment on her home in 1953. *New Amsterdam Casualty Company* v. *Waller*, 196 F. Supp. 780 (M.D. N.C., 1961).

Upon review, the Court of Appeals disagreed on the applicable statute of limitations, and held that the 3-year statute should have been applied. It was further held

that since the defendant used funds of the judgment debtor to make many of the loan payments on her home, unaffected by the application of the 3-year statute of limitations, the plaintiff was entitled to some relief, and remanded the case for further proceedings. *New Amsterdam Casualty Company* v. *Waller*, 4 Cir., 301 F. 2d 839 (1962).

Upon remand, the parties stipulated that during the three-year period immediately preceding the commencement of this action, the principal mortgage indebtedness on defendant's loan with the Home Savings and Loan Association was reduced from $17,180.69 to $11,105.63, or by a total of $6,075.06. The parties further stipulated that in addition to the principal payments on the mortgage, defendant paid said Savings and Loan Association the sum of $2,188.94 in the form of interest on the indebtedness, making total payments to the Savings and Loan Association during the three-year period immediately preceding this action of $8,264.00. Of these total payments, one payment in the sum of $2,000.00 was made by the defendant's son from his own earnings, all of which was applied to the principal indebtedness. The Court of Appeals has indicated that the record appears to show plainly that all payments on the mortgage, other than the one payment in the sum of $2,000.00 made by defendant's son from his own earnings, were derived from the earnings of the defendant's husband. This Court now finds such to be a fact.

In view of the decision of the Court of Appeals, and the stipulations of the parties after remand, the principal questions for decision are (1) whether the plaintiff is entitled to have the defendant declared a constructive trustee for its benefit only with respect to the principal payments of $4,075.06, derived from her husband's earnings during the three-year period immediately preceding the institution of this action, or is entitled to have included the sum of $2,088.94 paid in the form of interest during

said three-year period, which was also derived from her husband's earnings, (2) whether the defendant is liable for interest on any of the funds received from her husband and used in making payments on her home during said period, and (3) whether the plaintiff should be entitled to file a supplemental complaint, pursuant to Rule 15(d), Federal Rules of Civil Procedure, so as to include any amounts the defendant might have paid on her home, which were derived from her husband's earnings, since the date of the institution of this action.

With respect to the first question, neither party has submitted any authority directly in point from this or any other jurisdiction. In the original action, the plaintiff only contended for the amount by which the defendant reduced the principal loan on her home through the use of funds belonging to her husband, the judgment debtor. This would not preclude the plaintiff from now obtaining such relief as it is entitled to under the facts, but tends to emphasize the problem with which the Court is confronted. In *Garland* v. *Arrowood, et al.*, 179 N.C. 697, 103 S.E. 2 (1920), the court was dealing with a situation where a judgment debtor had invested his own money in improvement on the land of his father in the amount of $1,400.00, but the investment enhanced the value of the land only $1,100.00. It was held that the land should be subject to a lien for the increased value added to it, and no further. In *Winchester-Simmons Co.* v. *Cutler*, 198 N.C. 331, 151 S.E. 622 (1930), a case where a judgment debtor had used funds to make repairs and improvements on the property of his wife, it was held that ". . . the lien of the creditor, in such event, is confined to the enhanced value of the land by reason of the expenditure rather than to the amount spent in making improvements." Language to the same effect is to be found in *Michael* v. *Moore*, 157 N.C. 462, 73 S.E. 134 (1911). While it is true that the interest payments were made in order to preserve the defendant's title to her home and prevent foreclosure, and

in this sense can be said to have accrued to the defendant's benefit and enhanced the equity in her home, the same could be said with respect to money used for the payment of taxes, and perhaps insurance. If the defendant's husband had taken title to the property in his own name, rather than the name of his wife, funds used to pay interest, taxes, insurance, and other similar charges, could not now be reached by his judgment creditor. It would be only his net equity in the home that would be available for the payment of his debts.

With respect to the payments made by the defendant to the building and loan from funds derived from her husband's earnings during the three-year period immediately preceding the institution of this action, it is concluded that the plaintiff's recovery must be limited to $4,075.06, which sum represents the total amount of said payments applied to principal, less $2,000.00 paid by the defendant's son from his own earnings.

We now turn to the question of whether the plaintiff's recovery should bear interest from the date the defendant made the various payments to the building and loan association, or from any other date. Here again, neither party has cited any North Carolina case bearing directly upon the subject. It has already been determined that the defendant was not guilty of actual fraud in receiving her husband's checks and applying them to payments on her home for the reason that she had followed the same practice of receiving the checks since at least 1943, long before the plaintiff's claim arose, and there was no secrecy or concealment with respect to the disposition being made of the checks. The authorities seem to make a distinction between the liability of a fraudulent grantee for interest, depending upon whether the fraud was actual or constructive. Since we are here dealing with a constructively fraudulent transfer of funds, and the plaintiff had made no demand upon the defendant prior to the

institution of this action, it is concluded that the plaintiff is only entitled to interest from the date of the institution of this action on December 28, 1959. See 37 Corpus Juris Secundum, Fraudulent Conveyances, § 279 b.(3), and *Patterson* v. *Sims*, 5 Cir., 281 F. 2d 577 (1960).

While no formal motion has been made in this regard, the plaintiff has requested leave of the court to file a supplemental complaint, pursuant to Rule 15(d), Federal Rules of Civil Procedure, to show the amount of funds which were derived from her husband's earnings, the defendant has used to make mortgage payments on her home since the institution of this action. To allow the motion would require a further utilization of discovery procedures and an entirely new trial. Since the amount involved would be considerably less than the amount required for diversity jurisdiction, a serious jurisdictional question would be presented. If one supplemental complaint should be permitted, there is no reason why the same should not be allowed at reasonable intervals for an indefinite time. Under such circumstances, there would be no foreseeable end to the litigation. Under all the circumstances, the court, in its discretion, denies plaintiff's request for leave to file a supplemental complaint. 1A Barron and Holtzoff Federal Practice and Procedure, § 455; *Dixi-Cola Laboratory* v. *Coca-Cola Co.*, 4 Cir., 146 F. 2d 43 (1944).

For the reasons stated, and in accordance with the Mandate of the Court of Appeals for this Circuit, it is concluded and found that the defendant is a constructive trustee for the benefit of the plaintiff with respect to funds in the amount of $4,075.06, derived from her husband's earnings and used in making payments to the Home Savings and Loan Association during the three-year period immediately preceding the institution of this action, with interest thereon from December 28, 1959, until paid at the

rate of 6 per cent per annum, subject to the $500.00 personal property exemption of the judgment debtor.

Counsel for the plaintiff will prepare and present to the Court for signing, after same has first been exhibited to counsel for the defendant for approval as to form, a decree in accordance with the Mandate of the Court of Appeals and this opinion.

/s/ EDWIN M. STANLEY
United States District Judge

September 21, 1962

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8889.

NEW AMSTERDAM CASUALTY COMPANY,
Appellee and Cross-Appellant,

v.

GLADYS N. WALLER, *Appellant and Cross-Appellee.*

Cross-Appeals from the United States District Court for the Middle District of North Carolina, at Durham.
EDWIN M. STANLEY, *District Judge.*

(Argued April 1, 1963. Decided September 16, 1963)

Before Haynsworth and Bryan, Circuit Judges, and Harry E. Watkins, District Judge.

C. K. Brown, Jr., and Willis Smith, Jr., (Smith, Leach, Anderson & Dorsett on brief) for Appellee and Cross-Appellant, and Charles B. Nye for Appellant and Cross-Apellee.

HAYNSWORTH, *Circuit Judge:*

Cross appeals bring this case before us once again, each of the parties tendering a variety of questions.

Upon instructions of the judgment debtor, Waller, his employer mailed all of his salary checks to Mrs. Waller or to her agent. Out of the funds thus coming into her hands, Mrs. Waller accumulated some $12,000, which she used to construct a house at a cost of approximately $34,000 upon a lot which she had acquired in her name. The construction cost in excess of the $12,000 cash she

had accumulated, was financed through a mortgage loan. Thereafter, largely out of her husband's funds coming into her hands, she regularly made payments upon the mortgage. At all relevant times, she knew of the existence of the unsatisfied judgment against her husband.

The judgment creditor instituted this action against Mrs. Waller to subject to equity in her house to its judgment against the husband. The action was commenced more than three years after the construction of the house and the disbursement of the $12,000.

Originally, the District Court held that there had been a fraudulent transfer of the $12,000, and that the house should be subjected to its payment. It held that the applicable period of limitations was not the three years governing actions founded upon fraud, but ten years governing actions to enforce resulting trusts.[1]

On appeal, we took a different view of the limitations question, holding that the applicable limitations period was three years, but we remanded the case for further consideration since it appeared on the record that the wife, within the period of limitations, had made a number of payments on the principal of the mortgage out of the funds of her husband.[2]

Upon the remand, the District Court found that during the 3 year period immediately preceding the filing of this action, the sum of $6,075.06 had been paid upon the principal of the mortgage, of which $2,000 had been paid by a son of the Wallers, while the remaining $4,075.06 had been paid by Mrs. Waller out of funds supplied her by her husband. In addition, there had been paid to the mortagee some $2,188.94 in interest. The District Court

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[1] 196 F. Supp. 780.

[2] 301 F. 2d 839.

subtracted from the $4,075.06 paid by Mrs. Waller upon the principal of the mortgage debt the sum of $500, being the amount of the personal property exemption of a judgment debtor under Article X, § 1 of the North Carolina Constitution. Judgment was thus entered for the judgment creditor in the amount of $3,575.06, with interest from the date upon which the complaint was filed.

The defendant, on her appeal, contends that the plaintiff should recover nothing, for it should not have been allowed to shift the theory of its case. She also contends that no interest should have been allowed. On its appeal, the plaintiff contends that it had insufficient notice of the fraudulent transfers to start the running of the Statute of Limitations until shortly before the action was commenced, and that it is thus entitled to recover the $12,000 cash fund expended by the defendant, as well as the mortgage payments made more than three years before the action was commenced. It contends it is entitled to recover the interest paid by Mrs. Waller to the mortgagee and should be allowed interest on all payments made on the mortgage from the date of payment. It objects to the reduction of the judgment by the amount of the personal property exemption, and contends it should have been allowed to file a supplemental complaint bringing into question all payments on the mortgage subsequent to the filing of the complaint and up to the date of the hearing.

Generally, we affirm the rulings of the District Court, though we think the judgment should not have been reduced by the amount of the personal property exemption, and that leave to file a supplemental complaint should have been granted.

I

Stipulation, Bearing on Theory of Case, as Bar to Recovery

In Michael v. Moore, 157 N.C. 462, 73 S.E. 14, the Supreme Court of North Carolina held on comparable facts that the judgment creditor was entitled to recover the value of the improvements notwithstanding a jury's finding that there was no actual intent to defraud when the husband's funds were used to improve the wife's property. It held that the wife was a constructive trustee and held her to account as such. The Court in Michael v. Moore was not concerned with the question of limitations, but the plaintiff here, in an effort to avoid the shorter 3-year limitations period, insisted that it was not claiming any actual fraud, that it was entitled to judgment even though there was no actual fraud, and that the limitations period applicable to actions founded upon fraud did not govern the case. It stipulated that it was "not depending upon" the North Carolina statutes governing fraudulent conveyances.[3]

In disposing of the limitations question, we held that the cause of action was based upon fraud. It is dependent upon the statutes, though the North Carolina statutes are substantially a re-enactment of 13 Eliz. c. 5, § 2,[4] which, with respect to the rights of existing creditors, was declarative of the common law.[5] The defendant, therefore, insists that a judgment may not now be entered for the plaintiff when it is supportable only upon a theory which the plaintiff had disclaimed in its formal stipulation.

A judicial admission is usually treated as absolutely binding, but such admissions go to matters of fact which, otherwise, would require evidentiary proof. They serve

[3] General Statutes of North Carolina §§ 39-15, 39-17.

[4] Bank v. Adrian, 116 N.C. 537, 21 S.E. 792.

[5] See Long v. Wright, 48 N.C. 290.

a highly useful purpose in dispensing with proof of formal matters and of facts about which there is no real dispute. Once made, the subject matter ought not to be reopened in the absence of a showing of exceptional circumstances, but a court, unquestionably, has the right to relieve a party of his judicial admission if it appears that the admitted fact is clearly untrue and that the party was laboring under a mistake when he made the admission.[6]

The doctrine of judicial admissions has never been applied to counsel's statement of his conception of the legal theory of the case. When counsel speaks of legal principles, as he conceives them and which he thinks applicable, he makes no judicial admission and sets up no estoppel which would prevent the court from applying to the facts disclosed by the proof, the proper legal principles as the Court understands them.

This is the whole theory of modern developments in rules of pleading and procedure. Under the Federal Rules of Civil Procedure, which govern here, a plaintiff in his complaint is required only to set forth "a short and plain statement of the claim."[7] He need not set forth any theory or demand any particular relief for the court will award appropriate relief if the plaintiff is entitled to it upon any theory.[8] Under this liberalized practice,

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[6] See 9 Wigmore on Evidence (3d ed.) § 2590. Wigmore deals generally, with the subject of judicial admissions, beginning with § 2588.

[7] Rule 8(a)(2); see Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80; Arthur H. Richland Company v. Harper, 5 Cir., 302 F.2d 324.

[8] See Conley v. Gibson, 355 U.S. 41, 47-48, 78 S.Ct. 99, 2 L.Ed. 2d 80, followed in Beacon Theatres v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed. 2d 988; Dann v. Studebaker-Packard Corporation, 6 Cir., 288 F.2d 201, 216; United States v. Martin, 10 Cir., 267 F.2d 764, 711; Dotschay v. National Mutual Insurance Company, 5 Cir., 246 F.2d 221, 223; Hamill v. Maryland Casualty Co., 10 Cir., 209 F.2d 338, 340.

a party's misconception of the legal theory of his case does not work a forfeiture of his legal rights.[9]

The defendant's suggestion, that counsel's adherence to an insupportable legal theory is an irrevocable judicial admission, is a reversion to an earlier day when claims and defenses of merit were forfeited by a misstep in the negotiation of tortuous procedural paths. Then, in many contexts, misconception of the substantive right could lead to procedural mistakes which controlled the court's decision. The present rules, however, have relegated such perils to the past. The purpose of their adoption was broader than the simplification of procedures for the convenience of lawyers and judges. They were designed for the protection of the diligent litigant who has a just cause, but who, during some stage of the proceedings, misconceived the nature of his cause or mistook his remedy. In this day, a party ought not and does not lose his right when his counsel, however formally, advances an erroneous legal theory. If, on the facts disclosed, the party is entitled to some relief, it is the duty of the court to award it.

The question with which we dealt on the previous appeal had not been considered in any illuminating opinion by the Supreme Court of North Carolina. If its answer was not obscure, there was more than superficial support for the plaintiff's theory in isolated statements of that court that a constructive trust might arise in the absence of fraud, actual or constructive. The very fact that the District Court, in the first instance, agreed with the plaintiff on the limitations question attests the fact that the

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[9] See United States v. Martin, 10 Cir., 267 F.2d 764; Dotschay v. National Mutual Insurance Company, 5 Cir., 246 F.2d 221; Hamill v. Maryland Casualty Co., 10 Cir., 209 F.2d 338; Kansas City, St. L. & C. R. Co. v. Alton R. Co., 7 Cir., 124 F.2d 780. See also Rule 54(c); 6 Moore's Federal Practice (2d ed.) ¶ 54.60 p. 1203, et seq.

plaintiff's original legal position was not beyond the range of arguability. But whatever may now be said of its merit or demerit, it was simply the plaintiff's notion of a legal theory which would support its recovery of all that it claimed. The fact that we refused to accept its theory, is no basis for withholding the more limited relief available on the legal theory that the court does approve, though the theory which the court was persuaded to accept had been disclaimed by the plaintiff when it sought the whole loaf.

II

Plaintiff's Notice of the Fradulent Transfer

The plaintiff contends that it did not have sufficient notice of the fraudulent transfers until shortly before commencement of this action on December 28, 1959. In proceedings supplemental to the original action in which it obtained its judgment, however, the plaintiff had examined Mr. Waller on August 27, 1956. It now contends that some of Mr. Waller's answers were untruthful and misleading, and, on that account, it was not sufficiently informed of the actual situation to start the running of the statute. Mr. Waller, however, plainly stated that his employer, at his request, sent all of his salary checks to Mrs. Waller which she deposited to her account, and that he never saw them. It also appeared that she made the payments on the mortgage. Though Mr. Waller claimed in 1957 that his son and the two daughters made contributions to a fund out of which mortgage payments were made, it clearly appeared that some of his funds had been used by his wife for the construction of the house or curtailment of the mortgage. Indeed, in a stipulation in this action, the parties agreed that the facts alleged in the complaint were derived, in the main, from the adverse examination of Mr. Waller in 1956. That is a judicial admission, which the plaintiff should not now be allowed to controvert.

The 3-year period of limitations governing actions based upon fraud does not commence to run until the plaintiff has notice of the fraud, but the notice which starts the running of the statute is not complete information of all details of the transaction. The statute starts to run when the plaintiff acquires sufficient information to give rise to a reasonable belief that a fraudulent conveyance has occurred. It is enough when he has sufficient information to put a reasonable person on notice that further inquiry is called for. The plaintiff could not tell from what Mr. Waller disclosed in 1956 how much of Mrs. Waller's equity in the house had been purchased with her husband's funds, but it knew that some of the husband's funds had been used for that purpose, and that Mrs. Waller had no other income or means of support. What the plaintiff then knew was quite enough to put it on notice that a fraudulent transfer had occurred and to put upon it the onus of further inquiry.

III

The Constitutional Exemption from Levy

In the first appeal, Mrs. Waller contended that North Carolina's constitutional provision,[10] granting to a judgment debtor an exemption from levy of personal property equal in value to $500, immunized the husband's gifts to her since he gave her no more than $500 at any one time. We summarily disposed of the contention, for the exemption can be claimed only at the moment of levy and is not a sword for the frustration of the laws relating to fraudulent conveyances. On remand, the same exemption was again asserted, now in a different context, and the District Court reduced the judgment it otherwise would have entered by $500, the amount of the constitutional exemption. In doing so, we think it was mistaken.

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[10] Article 10, § 1.

We would not have supposed that the fraudulent donee could claim the personal property exemption of the fraudulent donor. If he has given away his property so that, as between him and the donee, he has no legal or equitable claim to it, he hardly has standing to say that his creditor may not have a portion of it. If there were a resulting trust, if donor and donee had agreed that the property was actually the husband's, placed in the wife's name only to circumvent his creditors and would be reconveyed by the wife to the husband upon his demand, then, of course, it was not a fraudulent conveyance in the sense that we have used the term, and the wife, rather than being a constructive trustee would be the trustee of a resulting trust. In that event, the property would be the husband's and the 10-year period of limitations would be applicable, rather than the three. In that event, the husband could claim his personal property exemption at the time of levy, but the plaintiff would not be embarrassed by the shorter period of limitations and the $500 exemption would be the only limiting factor upon its recovery.[11]

Nevertheless, in Michael v. Moore, 157 N.C. 462, 73 S.E. 104, the North Carolina Supreme Court has apparently held, under such circumstances that the fraudulent donee is entitled to claim the personal property exemption of the fraudulent donor. It was not applied as the District Court applied it here, however, and what was done in Michael v. Moore is not a precedent for the reduction of the judgment.

The plaintiff in Michael v. Moore had a judgment against the fradulent donor for $348.15. The fraudulent conveyance was of $2,000, which the fraudulent donee had used in the construction of a house. The court reasoned that had there been no fraudulent conveyance, the judgment

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[11] The exemption is of personal property not exceeding $500. If the house and lot is the husband's under a resulting trust, his interest is realty not personalty.

debtor having retained the $2,000 in his hands, the personal property exemption would have entitled him to keep $500 of it. Though he had not chosen to keep it, the court thought that the creditor should take from the fraudulent donee no more than it could have got from the fraudulent donor if there had been no fraudulent transfer. It thus directed that the fraudulent donee's equity available for the satisfaction of the claim of the judgment creditor should not exceed $1500. Since the judgment creditor's claim was only $348.45, it probably was not embarrassed by the Court's application of the personal property exemption. Clearly, however, the court did not reduce the judgment by the amount of the personal property exemption. Otherwise, the judgment would have been completely wiped out, and the court would have held the judgment creditor entitled to no relief. Since the court in Michael v. Moore granted the judgment creditor all the relief it sought, the case is clearly no authority for what was done here.

If we accept what was done in Michael v. Moore as declarative of the law of North Carolina, Mrs. Waller would be entitled to claim the personal property exemption of her husband, and, apparently, to treat her equity in the real estate as his personalty. The $500 personal property exemption would be subtracted from the value of her equity to the extent that it was attributable to funds supplied by her husband to determine the amount available for the satisfaction of her husband's creditors. Since, because of the Statute of Limitations, the judgment creditor can reach only a part of the fraudulent transfers, however, such an application of the personal property exemption is academic. Mrs. Waller's equity attributable to the funds she obtained from her husband, reduced by $500, far exceeds the aggregate amount of the fraudulent transfers which the plaintiff can attack in this proceeding within the confines of the 3-year statute of limitations.

The plaintiff's judgment should not have been reduced by the amount of the constitutional personal property exemption.

IV

Interest Paid on the Mortgage Debt

The plaintiff contends that its recovery should be measured by the total of all mortgage payments, including their interest increment. The District Court had measured the recovery by the amount by which the principal indebtedness had been reduced with funds derived from the husband, and that we think was clearly proper.

In this kind of proceeding, the fraudulent donee is required to disgorge what she has. Upon the suit of the judgment creditor, she should be required to surrender what she holds to her unjust enrichment and which should have been applied by her donor to the payment of his debt. As a general rule, however, she cannot be required to surrender more than she has, and what she has expended in the payment of interest, real estate taxes and for maintenance and repair of the house, though necessary to her use and enjoyment of the house, has not enhanced the value of the property in her hands. When she used her husband's funds to reduce the principal of the mortgage debt, she enhanced her equity in the house in that exact amount, but her payments of interest to the building and loan association had no such effect.

V

Interest on the Plaintiff's Claim

The District Judge awarded interest from the date of the filing of the complaint in this action. On appeal, the plaintiff contends that the interest should run from the date of each payment made by Mrs. Waller to the building and loan association out of funds supplied by her

husband. The defendant contends, on the other hand, that no prejudgment interest should have been allowed. We agree with the District Judge.

These fraudulent transfers, perfectly valid as between the immediate parties, are subject to attack by the creditor. At the instance of the creditor the donee may be compelled to surrender what she has received, but the creditor is under no duty to attack the transaction, and, unless it makes some demand upon the donee, the donee has every right to receive and enjoy the benefit of what she has been given by her donor in fraud of his creditors. By affirmance, the creditors can validate the transactions completely, and, until some demand is made upon the donee, the donee ought not to be responsible for interest.

The filing of the complaint in this action, however, was clearly a formal demand upon the donee. The transfers were plainly in violation of the statute, and the source of the funds which she had used in the construction of her house and the curtailment of her mortgage was known to her and their amount readily ascertainable.

For such reasons, the District Court quite properly awarded prejudgment interest beginning with the date upon which the complaint was filed.

VI

Permission to File a Supplemental Complaint

Finally, the plaintiff complains that it should have been allowed to file a supplemental complaint so as to reach transfers of the husband's funds to the wife to the extent that they were used to reduce the mortgage debt during the period between the filing of the complaint and the hearing. We think such permission should have been granted.

The essential legal and factual questions have been settled in this action. The substantive rights of the plaintiff

have been declared and adjudicated. It is clear that, substantively, the defendant is accountable to the plaintiff for all reductions in the principal of the mortgage debt, to the extent that they were effected with funds supplied by her husband, and this is true of payments during the period after the filing of the complaint, as well as of those during the period of three years preceding the filing of the complaint. Unless the plaintiff is allowed to file a supplemental complaint requiring the defendant to account for such payments in this action, it will be necessary for the plaintiff to commence an entirely new proceeding, and since there would then be no independent ground of federal jurisdiction, the new proceeding would have to be brought in another court.

Since all the relief to which the plaintiff is substantively entitled can be awarded in this action, the filing of a supplemental complaint should have been allowed. While the defendant foresees great practical problems arising from the allowance of a supplemental pleading, we see none. The allowance of such a supplemental pleading presents no new substantive controversy. Its allowance would only require that Mrs. Waller prove the source of the funds which were utilized to reduce the mortgage debt during the period covered by the supplemental complaint. Except that some question may arise as to whether or not the supplemental pleading can bring into question transfers occurring more than three years earlier, the original complaint having been filed more than three years ago, we foresee no unusual problem or difficulty arising out of the allowance of the supplemental pleading.

Rule 15(d) of the Federal Rules of Civil Procedure provides for such a supplemental pleading. It is a useful device, enabling a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted. So useful they are and of

such service in the efficient administration of justice that they ought to be allowed as of course, unless some particular reason for disallowing them appears, though the court has the unquestioned right to impose terms upon their allowance when fairness appears to require them.

We thus conclude the supplemental pleading should have been allowed.

CONCLUSION

On most of these several points advanced on appeal, we find ourselves in complete agreement with the District Court. Its reduction of the judgment by the amount of the personal property exemption, we find unwarranted, and we think, upon remand, a motion of the plaintiff to file a supplemental complaint should be granted, so that all relief to which the plaintiff is entitled up to the date of the filing of the supplemental pleading can be awarded. For those purposes, the judgment below, while generally correct, is vacated and the cause remanded for further proceedings not inconsistent with this opinion.

Vacated and remanded.

The late Judge Harry E. Watkins expressed his approval of the result of the foregoing opinion, but died before the opinion was prepared.

ALBERT V. BRYAN, *Circuit Judge*, dissenting in part:

My only disagreement with the opinion of the Court is its failure to allow recovery by the plaintiff of the mortgage interest payments made from the donor's moneys. I do not think it can be said that the satisfaction of the interest obligation failed to enhance the value of the property in the donee's hands. To my mind, it increased her equity as much pro tanto as did the payments on the principal. The interest was as much a mortgage debt and lien as the principal. If the interest had not been paid, its accumulation would have decreased the equity of the

donee in the property. In this way satisfaction of the interest increased the equity.

Judge Watkins expressed his concurrence in the determination stated by the opinion on this aspect of the case as well as the remaining parts of it. My difference, therefore, is the minority view and does not require resubmission of this case.

Judgment

Filed And Entered, September 16, 1963

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8889

NEW AMSTERDAM CASUALTY COMPANY, *Appellee and Cross-Appellant*

v.

GLADYS N. WALLER, *Appellant and Cross-Appellee*

Cross-Appeals from the United States District Court for the Middle District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Middle District of North Carolina and was argued by counsel.

On consideration, whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated; that this cause be, and the same is hereby, remanded to the United States District Court for the Middle District of North Carolina, at Durham, for further proceedings not inconsistent with the opinion of the Court this day filed; and that each party bear its own costs on appeal.

(s) CLEMENT F. HAYNSWORTH, JR.

U. S. Circuit Judge

I dissent in part.

ALBERT V. BRYAN
U. S. Circuit Judge

Filed
Sept. 16, 1963
MAURICE S. DEAN
Clerk